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No. 83-1242

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SUN MYUNG MOON and TAKERU KAMIYAMA,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF AMICUS CURIAE AMERICAN ASSOCIATION OF CHRISTIAN SCHOOLS IN SUPPORT OF PETITION FOR CERTIORARI

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INTEREST OF AMICUS CURIAE

Both parties have consented to the filing of this brief pursuant to Rule 36 of the Rules of this Court. Their consents are on file with the Clerk of the Court.

The American Association of Christian Schools (AACS) consists of more than 1,130 member schools from across the nation. These member schools engage in practices that are similar or identical to some of those involved in this case. Many of them accumulate funds over periods of years to carry out religious ministries. Some-

times these funds are held in the name of a single individual, as they were in this case. Moreover, many of the reasons given by the courts below to justify treating the income from religious gifts as taxable to Rev. Moon could be applied to various AACS members—the lack of a formal organizational structure, for example. The AACS therefore has a vital interest in the proper disposition of this important case because the decision of the courts below, if permitted to stand, has the potential of generating extremely adverse effects upon its members.

SUMMARY OF ARGUMENT

Certiorari should be granted in this case for two reasons.

First, the rulings of the courts below have a vast potential for imposing onerous burdens upon the free exercise of religion by many Americans. These rulings permit the government to ignore the doctrines and structures of religious organizations, and to disregard the conscientious and sincere beliefs of members of those organizations, in determining whether a given activity is secular or religious. They pose a particular hazard to the AACS because its principal activity is the establishment and maintenance of Christian schools. That activity can be regarded as secular under the decisions below, which permit religious doctrine and sincere beliefs to be held for naught. Moreover, many members of the AACS are especially vulnerable to charges of shortcomings of the kind which the courts below held to justify treating certain activities as secular; shortcomings such as the lack of formal organizational structure, and the absence of a "clear and unambiguous" intent to create a trust. The number of organizations subject to these potential hazards to free exercise is huge.

Second, the rulings of the courts below are inconsistent with doctrine this Court has established in Free Exercise Clause cases.

ARGUMENT

I. The Rulings of the District Court and the Opinion of the Court of Appeals Approving Them Have a Vast Potential for Imposing Onerous Burdens Upon the Free Exercise of Religion by Countless Numbers of People and Therefore Cry Out for Plenary Review by This Court.

The undisputed issue in this case is deceptively simple: did the bank accounts and other assets held in Rev. Moon's name belong to him personally, or were they rather church property held by him as a trustee? All four judges in the courts below agreed that this was the central issue.[1]

The courts below resolved this issue by focusing on two distinct, but overlapping questions: Was a trust created at the time the assets were donated? And were the uses which Rev. Moon made of the assets personal or religious?

As to the trust question, the jury was given a list of "factors" it could consider. Conspicuous among these factors was "the fact that the accounts were maintained under Reverend Moon's name" (a fact which was never denied), and "whether the Movement had a specific organizational structure, written charter or constitution." Petn. App. 68 n.3.[2] But the jury also was instructed that religion had nothing to do with the resolution of this question. T. 6538. The Court of Appeals then went even further; it held that the District Judge would not have been required to instruct on the law of trusts at all. Petn. App. 25.

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[1] We adopt the statement of the case contained in the Petition for Certiorari, and supplement it only when necessary.

[2] Our citations to the opinions of the Court of Appeals in this case will be to the Appendix contained in the Petition for Certiorari, as follows: "Petn. App. ——." Our few references to the trial transcript are denoted "T. ——."

The rulings of the trial judge and the opinion of the Court of Appeals together result in a threefold burdening of the free exercise of religion. *First*, they put a religious organization at the peril of losing its constitutional benefits if a jury second guesses it and concludes that its "organizational structure" is inappropriate to carry out its religious missions. *Second*, they disregard as irrelevant whether the religion's "organizational structure" was influenced or dictated by religious doctrine or practices. Moreover, they relegate to the status of a "factor to be considered" the religious intent of the donors of the assets—which means, of course, that the jury is free to disregard that factor if it chooses to do so. *Third*, as dissenting Judge Oakes pointed out, they impose upon the religious organization the burden of proving that its "organizational structure" is appropriate to its mission while at the same time they deny the organization the opportunity to show that its structure was influenced or dictated by its religious doctrines or practices. Petn. App. 73-74.

As to the uses made of the assets (whether they were "personal" or "business" rather than religious), the courts below held that this question could be resolved without considering the obviously religious context in which the donations were made, or the purposes which the church considered to be within its religious mission. The jury was given virtually no guidance on this question.[3] Instead it was allowed to decide, in its uncon-

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[3] Only two paragraphs of the lengthy set of instructions dealt with this question, and they were ambiguous at best:

> Also the mere fact that Reverend Moon exercised control over the funds and the stock is not necessarily indicative of his personal ownership. A person who holds property on behalf of another may be given broad authority and discretion to deal with that property as long as he does so in a manner consistent

trolled discretion, whether the activities supported by the use of the assets were religious or not.

These rulings have an enormous potential for imposing onerous burdens upon the free exercise of religion by the members of the AACS. Three characteristics of Christian schools are especially significant in evaluating their potential effects.

First, members of AACS conscientiously and sincerely believe that founding Christian schools is a religious mission that serves a religious purpose. Dr. Paul A. Kienel recently put the matter succinctly when he testified before a congressional committee:

> These beliefs of ours have one consequence of special relevance to your Committee today; we are *required* by our religious convictions to found and maintain Christian schools. Put differently: our Christian schools exist *solely* because of our Christian faith. They have no other reason for being. We obviously do not found Christian schools for secular purposes—just to assure, for example, that children will learn mathematics, English or other "basics." While superior academics is not our primary purpose we are pleased, of course, that the achievement level of our students is one full grade level ahead of the nation's public schools. [Testimony of Paul A. Kienel, Executive Director, Assn. of Christian Schools International, at Hearing Before United States Senate Committee on Finance on Mandatory Social Security Coverage for Employees of Religious Organizations, Washington, D.C., December 14, 1983, p. 2 (emphasis in original).]

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with the purpose for which he was given title to the property in the first place.

* * * *

A religious organization can properly pay the living expenses of [its] leaders or ministers in order to allow them to pursue its religious purposes and can make loans to its ministers or leaders on arm's length terms.

Pet'n. App. 69 n.3.

But most Americans think of education as a secular activity. If juries are free to determine that such activities are secular in disregard of conscientious and sincere religious beliefs, as the courts below held they are, the consequences to members of AACS, and to the thousands of Americans who believe as they do but who are not its members, will be earth shaking.

It is easy to discern why most Americans think of education as a secular activity. Under a long line of widely publicized decisions from this Court, they are *required* to think of *public* education as secular. E.g., *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963); *Epperson v. Arkansas*, 393 U.S. 97 (1968); *Stone v. Graham*, 449 U.S. 39 (1980). But this is not a case, like those just cited, in which the Establishment Clause requires courts to distinguish the areligious from the secular. This is not even the case in which the issue is whether collecting a certain tax is a sufficiently compelling governmental interest to override a legitimate Free Exercise Clause claim. *Cf., United States v. Lee*, 455 U.S. 252 (1982). Rather, the issue in this case is whether a legitimate free exercise claim can be overridden by a jury's unguided and *ex post facto* conclusion that a religion's "organizational structure" is inappropriate, or that its members' intention to create a trust is not sufficiently "clear and unambiguous," *in the absence of any indication by government*, by way of the statute or other positive law, *that it has any interest whatsoever* in regulating the kinds of organizations that churches must establish or specifying the clarity of intent that must be shown when members make a religious donation.

Second, although most of the schools associated with AACS are owned by churches, some of them are independent of any church. The latter are organized by small groups of individuals whose bond is a shared belief

in the authority of the Bible. The religious character of the Christian schools rests upon an especially strong belief in a Biblical and historical foundation for the conclusion that education is a religious enterprise:

> The word "church" in English comes from the Greek "ecclessia" which is the Greek form of two Hebrew words meaning congregation and assembly. Now, in the Old Testament the church or congregation had two facets, priestly and levitical. The levitical function as supplied in all of Deuteronomy and summed up in Deuteronomy 33:10 is instruction. With the atonement of Christ fundamentalists believe that the priestly function came to an end. In all forms of Western Christianity, including those churches such as the Catholic and Anglo Catholics who call their clergy priests, the basic function of the clergy is still levitical. In the Eastern churches, because of the influence of the Byzantine State which insisted on the rigid control of religious rights, the instructional aspect, the levitical function, of the clergy was lost. As a result, there has been a stultification and a lack of growth in the life of the Eastern churches because they have been limited to a liturgical function. In Western Christianity, the basic function of the church is levitical or instructional. Whenever that instructional aspect has been restrained or has declined through decadence in the church, the life of the church has become minimal and the faith has receded. The fundamentalists very strongly emphasize the levitical or instructional aspect of the life of the church as central (V, 41-41). [R. J. Rushdoony in Goodell and Lee, Government's Golden Image: Kentucky (Christian Heritage Ministries, Louisville, KY, 1980), 83.]

Such small groups are particularly vulnerable to second-guessing about the inadequacies of their "organizational structures," and about their faith and confidence in the individuals they have chosen to spearhead their efforts to found a Christian school.

Third, the number of people potentially affected by the lower courts' rulings is enormous. AACS has more than 1,130 member schools. Moreover, Christian day schools, which provide full-time elementary or secondary education, are the fastest growing segment of private education. One analysis, published in 1979, described their growth as follows:

> In the 1950s, 91 percent of all children in America attended tax-supported public schools. Today, only 74 percent of the nation's children are still enrolled in public schools. The rest are in private schools. Even more important, the fastest growing segment of private school enrollment is among evangelical Christians. There are now well over one million schoolchildren attending over 5,000 Christian (evangelical) elementary and high schools. *Two new Christian Schools are being established every twenty-four hours.* "In the past ten years our Christian School Movement has more than tripled," says Reverend Arno Weniger, executive vice president of the American Association of Christian Schools. The growth in Christian schools is truly one of the most significant cultural phenomena of the decade. By and large the students come from lower-middle-class families whose incomes lie in the ten thousand to fifteen thousand dollar range. Despite the often heard criticism that Christian school growth has been motivated by racial prejudice, the reality is just the opposite. Less than 5 percent of these private schools are segregationist oriented. The overwhelming majority are deeply committed to fostering integration between the races.
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> **There is no doubt that the mushrooming growth in evangelical believers, evangelical communications and evangelical infrastructures is the most significant cultural phenomenon in American life today. [Jeremy Rifkin, The Emerging Order: God in the Age of Scarcity (1979), 122, 126 (emphasis in original).]**

Later estimates have placed the number of such schools even higher. One recent study concluded that, ". . . between eight and ten thousand Christian day schools have been established since the mid-1960s, with a current enrollment of approximately one million students." Carper, The Christian Day School Movement, 1960-1982, 17 Educ. F. 135 (1983).

The intrinsic relation of the Christian school to the other ministries of the church was described by Rev. Guy G. Goodell, one of the plaintiffs in *Kentucky State Board v. Rudasill*, 589 S.W.2d 877 (Ky., 1979):

> The relationship is a very integral one. The school is not a separate entity. It is one of the arms and ministries of our church. For example, we have a ministry for the shut-ins in Frankfort, Kentucky; we have a ministry for people who are unable to provide transportation to church, and we have an extension ministry to help them and bring them in. We have a visitation ministry. We have a counseling ministry for people who are having marital problems. And then we feel, in order to prohibit or to prevent any future difficulties in the lives of children growing up and marrying, that we need to have some type of ministry to them in obedience to bible command. We have a school that takes the child at the very youngest age and begins to provide the teaching, inculcating of the Bible doctrine in his heart and mind at that age. We operate under the same board that our church operates under; that is, in other words, our deacons and trustees in the church are the leaders of the school and, as pastor of the church, I am Pastor and also principal of the school. We follow a curriculum plan of teaching the Word of God through the academic material that we use, and we comply with the absolute standards of the Word of God concerning the teaching ministry. [Goodell and Lee, Government's Golden Image: Kentucky (Christian Heritage Ministries, Louisville, KY 1980) 47.]

Other religious groups share this view that education is an exercise of religious ministry. See *Lemon v. Kurtzman*, 403 U.S. 602, 616 (1971) (The District Court concluded that the parochial schools constituted 'an integral part of the religious mission of the Catholic Church.' The various characteristics of the schools make them "a powerful vehicle for transmitting the Catholic faith to the next generation."); *Westbury Hebrew Congregation, Inc. v. Downer*, 59 Misc.2d 387, 388, 302 N.Y.S.2d 923, 925 (Sup. Ct., N.Y. Co. 1969), (The court indicated its approval of plaintiff's contention that "the parochial school use for the teaching of additional secular subjects is an integral part of the functions and activities of synagogue use and is accessory thereto.")

In light of these facts, the potentially pernicious effects of the rulings of the courts below on the free exercise of religion by countless Americans can be made even clearer.

Literally thousands of people who donate money for the purpose of establishing Christian schools may discover that, despite their intentions, their contributions were ineffectual—perhaps because the "organizational structure" of their group is found by hindsight, as permitted by the courts below, to have been inadequate; or because, never having heard of "trusts" and having no idea how to create one, their intentions were not made "clear and unambiguous," as required by the courts below; or because, as authorized by the courts below, a jury is permitted to decide that establishing a school is a secular rather than a religious purpose. The same reasons may justify denying them the right to deduct their contributions from their income tax liabilities. Since many of these people have only modest incomes (see Rifkin, *supra*), and many of them comply with the Biblical injunction to "tithe" their organizations, they may lose the only tax benefits for which they qualify.

It frequently happens that funds must accumulate for years before they reach a level sufficient to accomplish

one or another of the religious missions of Christian schools, such as the construction or purchase of a suitable building. It is not unusual for such funds to be held in the name of a single individual, as they were in this case. The decision of the courts below imperil this practice in a number of ways. First, if the income that accumulates from these funds is taxable to the person in whose name they are deposited, as the courts below held it may be, then the total accumulation is depleted pro tanto. Similarly, the result reached by the courts below cannot help but encourage the government, in its endless quest for additional revenue, to claim the right to tax such income. The accumulation thus will be depleted by the costs of fending off the claim even when the defense is successful.

Moreover, it is a long-standing practice of congregationally governed Christian churches to provide their ministers with "parsonage" and transportation allowances. Under the decision below, such allowances obviously may be viewed as "personal" rather than religious. The courts below went even further: they clearly held that juries may be permitted to decide that the total corpus of the fund from which these allowances are derived—not just the allowances themselves—may be considered to be secular. And lying just below the surface of the decision below is the implication that jurors are especially entitled to treat such funds as secular if the standard of living the congregation provides its minister is too lavish for their tastes.

The most disturbing element of the opinion below is its holding that juries may be permitted to decide, without regard to religious doctrine or structure, that certain activities are secular rather than religious. Our most obvious concern is the danger that establishing Christian schools will be found to be a secular activity. But we have other concerns too. As the Rev. Goodell pointed out in the abstract quoted above, many Christian organiza-

tions establish counselling ministries to assist married couples who are encountering difficulties. Many Christian schools establish summer camps to provide their children with opportunities of a kind usually associated with scouting. These camps typically have paid directors and staffs. The decision below opens the door to an ex post facto characterization of all of these activities as secular, despite the sincerely held belief of our members that they are essentially religious.

These few examples, which could be multiplied many times, only begin to suggest how drastic the implications of the decision below are for the free exercise of religion by the members of the AACS.

II. The Rulings of the District Court and the Opinion of the Court of Appeals Approving Them are Inconsistent With Free Exercise Clause Principles Established by This Court.

The Court of Appeals ruled that, "The central issue for the jury to decide was whether the Tong IL stock and Chase Manhattan Bank accounts belonged to the Church or to Moon personally." Petn. App. 43. The answer to this question, however, depended upon determining the purpose for which the funds were given to Rev. Moon and whether his use of the funds was within that purpose. The jury was permitted to decide this issue according to its own lights and with no requirement that it accept or even consider the Unification Church's own definition of its religious purposes. This is the major error with which Amicus is concerned.

No evidence was presented in this case that any of the money involved was given to Rev. Moon for any purpose other than what the donors regarded as the religious purposes of the Unification Church. Yet the jury was not required to accept or even to consider the good-faith belief of the donors and of the Church that the purposes and activities involved were religious. Instead, the jury was

permitted to decide that those professedly religious purposes and activities were not religious, as the Church and its members believed them to be, but were instead secular. And the jury decided that since, as the jury believed, some of the uses to which Rev. Moon put the funds were secular, therefore the entire fund had been given to him for secular rather than religious purposes and it belonged to him rather than to the Church.

Not only was the jury not instructed to accept or even to consider the Church's own conception of its religion, but the trial judge explicitly emphasized that religion had nothing to do with the case. The charge by the trial judge warned the jurors that:

> It is also your duty to appraise the evidence calmly and objectively and to reach your verdict in this case without prejudice or sympathy or any consideration of race, religion or ethnic origin. I have told you before and I repeat it again, that the race, religion and ethnic origin of the defendants is of no consequence whatever. They are on trial in an American court before American jurors under the Constitution of the United States and considerations of race or religion must have no part in your deliberations." [T. 6538.]

This case required the jury "to resolve a religious controversy." *Jones v. Wolf*, 443 U.S. 595, 604 (1979). The ownership issue depended on whether the purposes involved were religious or secular. "The Supreme Court has been especially sensitive to an entanglement which requires the state to distinguish between and thus determine what is religious and what is secular." *Surinach v. Pesquera de Busquets*, 604 F.2d 73, 78 (1st Cir. 1979). In *Lemon v. Kurtzman*, 403 U.S. 602, 620 (1971), the inspection and evaluation procedures involved in the program of state aid to parochial education were held to create an unconstitutional entanglement of government with religion because they could require "the govern-

ment to examine the school's records in order to determine how much of the total expenditures is attributable to secular education and how much to religious activity. This kind of state inspection and evaluation of the religious content of a religious organization is fraught with the sort of entanglement that the Constitution forbids. It is a relationship pregnant with dangers of excessive government direction of church schools and hence of churches." Similarly, this Court held in *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), that to construe the applicable statute to authorize National Labor Relations Board jurisdiction over Catholic school teachers "would implicate the guarantees of the Religion Clauses" (440 U.S. at 507) because "the schools had responded that their [alleged unfair labor practices] were mandated by their religious creeds. The resolution of such charges by the Board, in many instances, will necessarily involve inquiry into the good faith of the position asserted by the clergy-administrators and its relationship to the school's religious mission. It is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the Religion Clauses but the very process of inquiry leading to findings and conclusions." 440 U.S. at 502.

The inquiry process found objectionable by this Court in *Lemon v. Kurtzman* and *Catholic Bishop* is comparable to the process involved in this case. The jury evaluated, pursuant to criteria of its own devising, the includability of certain purposes and activities within the religious mission of the Unification Church. And it did so without regard to the Church's own conception of that mission. The vice in this sort of process was accurately described by the New York Court of Appeals in *Holy Spirit Ass'n v. Tax Comm.*, 55 N.Y.2d 512, 450 N.Y.S.2d 292, 435 N.E.2d 662 (1982):

> [The taxing agencies and the lower court] each asserted the right of civil authorities to examine the

> creed and theology of the Church and to factor out what in its or his considered judgment are the peripheral political and economic aspects, in contradistinction to what was acknowledged to be the essentially religious component. Each then took the view that beliefs and activities which could be objectively accurately described by knowledgeable outsiders as "political" and "economic" were by that fact precluded from being classified as "religious." As stated it is not the province of civil authorities to indulge in such distillation as to what is to be denominated religious and what political or economic. It is for religious bodies themselves, rather than the courts or administrative agencies, to define, by their teachings and activities, what their religion is. The courts are obliged to accept such characterization of the activities of such bodies, including that of the Church in the case before us, unless it is found to be insincere or sham. [55 N.Y.2d at 527-28.]

The decision in this case subjects Christian schools to the kind of factoring out process condemned by *Holy Spirit*. Courts will have a practically unlimited power to decide that Christian schools are not religious at all and that therefore they do not enjoy the special protection of the Free Exercise Clause of the First Amendment.

The Christian schools are entitled to constitutional protection in their own right (See *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Norwood v. Harrison*, 413 U.S. 455, 462 (1973)) and by reason of "the rights of parents to direct the religious upbringing of their children." *Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972). *Pierce* was described by the Court in *Yoder* as "a charter of the rights of parents to direct the religious upbringing of their children." 406 U.S. at 233. See also *Committee for Public Education v. Nyquist*, 413 U.S. 756, 788 (1973).

As long as Christian schools are recognized by the courts as a religious activity, they are protected by the

requirement that an infringement upon the free exercise of religion must be justified by a "compelling state interest . . . . It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, '[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation.' *Thomas v. Collins*, 323 U.S. 516, 530 . . . ." *Sherbert v. Verner*, 374 U.S. 398, 406-407 (1963). Also, "The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest. However, it is still true that '[t]he essence of all that has been said and written on the subject is that only those interests of the highest order . . . can overbalance legitimate claims to the free exercise of religion.'" *Thomas v. Review Board*, 450 U.S. 707, 718 (1981), quoting *Yoder*, 406 U.S. at 215.

If the conduct of a Christian school is held to be a secular rather than a religious activity, the claim of a right to participate in that sort of school will be viewed as merely a claim of a right to participate in a certain type of secular education. But since an infringement upon the right to education is not an infringement upon a fundamental right, it will not trigger the highest level of scrutiny (*San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973)) and the validity of that infringement will be determined by a less stringent criterion.

The Christian schools are concerned about regulations as to curriculum, education and other matters which are far from incidental, and which impose a direct and crippling burden on the free exercise of their religious ministry. Many court decisions, correctly applying principles developed by this Court, have recognized Christian schools as an exercise of religious ministry and, on that basis, have prevented the imposition on Christian schools of burdensome state regulations. See, for example, *State*

v. Whisner, 47 Ohio St.2d 181, 351 N.E.2d 750 (1976); *State v. LaBarge*, 134 Vt. 276, 357 A.2d 121 (1976); *Kentucky State Board v. Rudasill*, 589 S.W.2d 877 (Ky. 1979); *State ex rel. Nagle v. Olin*, 64 Ohio St.2d 341, 415 N.E.2d 279 (1980); *Baingor Baptist Church v. Maine* (U.S. District Court, District of Maine, Dec. 20, 1983); *Sheridan Road Baptist Church v. Michigan Dept. of Education* (Michigan Cir. Ct., Ingham County, Dec. 29, 1982, 3 Religious Freedom Reporter 10 (1983)).

However, the recognition that Christian schools are an exercise of ministry does not immunize them from all regulation since a court may still decide that a particular regulation is justified by a compelling state interest. See, for example, *State v. Shaver*, 294 N.W.2d 833 (N.D., 1980); *State ex rel. Douglas v. Faith Baptist Church*, 207 Neb. 802, 301 N.W.2d 571 (1981). Nevertheless, the recognition by the courts of the Christian school as an exercise of religious ministry is an important safeguard against abuse, since that recognition would require that any restriction on that religious ministry be justified by a compelling state interest, and that it be the least restrictive alternative available to protect that interest.

CONCLUSION

The rulings of the District Court and the opinion of the Court of Appeals approving them break new ground in Free Exercise Clause doctrine. They do so in a way that permits the imposition of onerous burdens upon the free exercise of religion by countless Americans, that is inconsistent with principles developed by this Court, and that conflicts with many lower court decisions that have conscientiously and correctly applied this Court's principles.

These rulings pose a particularly severe hazard to the establishment and maintainance of Christian schools, the

fastest growing segment of private education in the nation.

The rulings therefore cry out for plenary review by this Court. The thousands of people involved with Christian schools and the lower courts are entitled to an authoritative resolution of these crucial issues.

Accordingly, Amicus Curiae AACS joins in the Petitioners' prayer that a writ of certiorari issue.

Respectfully submitted,

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